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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

LEO DAVID HANSON,

Plaintiff,

3:13-cv-00397-MMD-WGC

V.

PAULI, et. al.,

Defendants.

**REPORT & RECOMMENDATION OF
U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before the court is Defendant Kevin Pauli's Motion for Summary Judgment. (Doc. # 20.)¹ Plaintiff filed an Opposition and Cross-Motion for Summary Judgment. (Doc. # 31.) Defendant Pauli filed a reply. (Doc. # 33.)

17 After a thorough review, the court recommends that defendant Pauli's motion be granted
18 and Plaintiff's motion be denied.

I. BACKGROUND

Plaintiff, a pro se litigant, is a prisoner in the custody of the Nevada Department of Corrections (NDOC). (Pl.'s Compl., Doc. # 4.) The events giving rise to this action took place while Plaintiff was housed at High Desert State Prison (HDSP). (*Id.*) He brings this action pursuant to 42 U.S.C. § 1983. (*Id.*)

On screening, the court determined Plaintiff could proceed with his claim of excessive force under the Eighth Amendment against defendants Starling and Pauli. (Screening Order, Doc. # 3.) Plaintiff alleges that on May 29, 2013, he was complying with orders to lie down on

¹ Refers to court's docket number. Unless otherwise indicated, all page number references are to the court's docketed page numbers.

1 the ground on his stomach, when without justification, defendant Starling "bounced [his] head on
 2 the ground" and "began punching [him] in the head and around [his] neck area. (Doc. # 4 at 4-5.)
 3 He contends that defendant Pauli then shot him with a 12-gauge shotgun, striking him in the
 4 bottom of his left foot and back of his right leg. (*Id.*)

5 The Attorney General filed a notice that it was not accepting service on behalf of Pauli or
 6 Starling, as they were not currently employed by NDOC. (Doc. # 9.) Their last known addresses
 7 were filed under seal. (Doc. # 10.) The court ordered the Clerk to issue summons and other forms
 8 so that the U.S. Marshal could serve the defendants at the addresses filed under seal. (*See* Docs.
 9 # 12, # 14, # 15, # 17.) Defendant Pauli then filed his motion for summary judgment, represented
 10 by the Attorney General's Office. (Doc. # 20.)

11 Defendant Starling was not served until March 5, 2014. (Doc. # 30.) Starling requested
 12 and was granted an extension of time to file a responsive pleading (Docs. # 32, # 34), and filed
 13 his answer on May 19, 2014. (Doc. # 34.)

14 The court issued a scheduling order on May 20, 2014. (Doc. # 41.) Discovery must be
 15 completed by August 18, 2014, and dispositive motions are to be filed by September 17, 2014.
 16 (*Id.*)

17 In his motion for summary judgment, defendant Pauli argues that his use of force on
 18 May 9, 2013, was justified and reasonable because Plaintiff attacked Correctional Officer
 19 Starling and ignored repeated commands to cease fighting as well as a warning shot before
 20 defendant Pauli fired a live round with pellets in Plaintiff's direction to gain his compliance.
 21 (Doc. # 20.) He further argues that he is entitled to qualified immunity because a reasonable
 22 officer would not have known that abiding by NDOC's use of force policy would violate the
 23 Eighth Amendment. (*Id.*)

24 In Plaintiff's opposition and cross-motion for summary judgment, he argues that
 25 consideration of defendant Pauli's motion should be continued until he has a chance to conduct
 26 discovery. (Doc. # 31.) He also contends that he was lying down on the ground and defendant
 27 Starling was still punching him at the time defendant Pauli fired the round at him. (*Id.* at 7.) He
 28 further disputes statements attributed to him in the report made after the incident by defendant

1 Starling, utilized in support of defendant Pauli's motion for summary judgment. (*Id.* at 8.) He
 2 contends that defendant Starling was using force against him maliciously and that defendant
 3 Pauli must have observed this when he fired the round at Plaintiff. (*Id.* at 11-12.)

4 **II. LEGAL STANDARD**

5 "The purpose of summary judgment is to avoid unnecessary trials when there is no
 6 dispute as to the facts before the court." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
 7 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted). In considering a motion for summary
 8 judgment, all reasonable inferences are drawn in favor of the non-moving party. *In re Slatkin*,
 9 525 F.3d 805, 810 (9th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255
 10 (1986)). "The court shall grant summary judgment if the movant shows that there is no genuine
 11 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.
 12 Civ. P. 56(a). On the other hand, where reasonable minds could differ on the material facts at
 13 issue, summary judgment is not appropriate. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
 14 250 (1986).

15 A party asserting that a fact cannot be or is genuinely disputed must support the
 16 assertion by:

- 17 (A) citing to particular parts of materials in the record, including depositions,
 documents, electronically stored information, affidavits or declarations,
 stipulations (including those made for purposes of the motion only), admissions,
 interrogatory answers, or other materials; or
- 19 (B) showing that the materials cited do not establish the absence or presence of a
 genuine dispute, or that an adverse party cannot produce admissible evidence to
 support the fact.

21 Fed. R. Civ. P. 56(c)(1)(A), (B).

22 If a party relies on an affidavit or declaration to support or oppose a motion, it "must be
 23 made on personal knowledge, set out facts that would be admissible in evidence, and show that
 24 the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

25 In evaluating whether or not summary judgment is appropriate, three steps are necessary:
 26 (1) determining whether a fact is material; (2) determining whether there is a genuine dispute as
 27 to a material fact; and (3) considering the evidence in light of the appropriate standard of proof.
 28 See *Anderson*, 477 U.S. at 248-250. As to materiality, only disputes over facts that might affect

1 the outcome of the suit under the governing law will properly preclude the entry of summary
 2 judgment; factual disputes which are irrelevant or unnecessary will not be considered. *Id.* at 248.

3 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.
 4 "When the party moving for summary judgment would bear the burden of proof at trial, 'it must
 5 come forward with evidence which would entitle it to a directed verdict if the evidence went
 6 uncontested at trial.'...In such a case, the moving party has the initial burden of establishing
 7 the absence of a genuine [dispute] of fact on each issue material to its case." *C.A.R. Transp.*
 8 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations
 9 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or
 10 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
 11 an essential element of the nonmoving party's case; or (2) by demonstrating the nonmoving party
 12 failed to make a showing sufficient to establish an element essential to that party's case on which
 13 that party will bear the burden of proof at trial. *See Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-
 14 25 (1986).

15 If the moving party satisfies its initial burden, the burden shifts to the opposing party to
 16 establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v.*
Zenith Radio Corp., 475 U.S. 574, 586 (1986). To establish the existence of a genuine dispute of
 17 material fact, the opposing party need not establish a genuine dispute of material fact
 18 conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a
 19 jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv.,*
Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quotation marks and
 20 citation omitted). The nonmoving party cannot avoid summary judgment by relying solely on
 21 conclusory allegations that are unsupported by factual data. *Id.* Instead, the opposition must go
 22 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
 23 competent evidence that shows a genuine dispute of material fact for trial. *Celotex*, 477 U.S. at
 24 324.

25 That being said,

26 [i]f a party fails to properly support an assertion of fact or fails to properly address
 27 another party's assertion of fact as required by Rule 56(c), the court may: (1) give

1 an opportunity to properly support or address the fact; (2) consider the fact
 2 undisputed for purposes of the motion; (3) grant summary judgment if the motion
 3 and supporting materials—including the facts considered undisputed—show that
 4 the movant is entitled to it; or (4) issue any other appropriate order.

5 Fed. R. Civ. P. 56(e).

6 At summary judgment, the court's function is not to weigh the evidence and determine
 7 the truth but to determine whether there is a genuine dispute of material fact for trial. *See*
 8 *Anderson*, 477 U.S. at 249. While the evidence of the nonmovant is "to be believed, and all
 9 justifiable inferences are to be drawn in its favor," if the evidence of the nonmoving party is
 10 merely colorable or is not significantly probative, summary judgment may be granted. *Id.* at 249-
 50 (citations omitted).

III. DISCUSSION

A. Summary of Argument

1. Defendant Pauli's Motion

On May 29, 2012, Correctional Officer Starling was assigned to Search and Escort at HDSP. (Doc. # 20 at 3; Doc. # 20-1 at 2.) At approximately 1:55 p.m., Correctional Officer Starling was escorting thirteen newly-admitted inmates from the 5/6 quad yard into the 7/8 quad yard to show them their housing units. (*Id.*) In addition to the thirteen inmates Correctional Officer Starling was escorting, there were many unrestrained inmates on the 7/8 quad yard. (*Id.*)

According to Correctional Officer Starling's report made after the incident, Plaintiff, who was on the 7/8 yard quad, initiated a verbal confrontation with Correctional Officer Starling, yelling that he felt Correctional Officer Starling was disrespecting him. (*Id.*) Officer Pauli, who at the time was assigned as the "gunrail" officer for units 7 and 8 and was positioned on top of Unit 7 C-D, could not see who the inmate was from his position but heard Officer Starling say: "Nobody is talking to you nobody is disrespecting you so you can back off." (Doc. # 20-2 at 2.)

Officer Starling claims that Plaintiff then began clenching his hands into fists and pacing back and forth, and then jumped down from his position on the concrete stump and began walking towards Officer Starling. (*Id.*) Plaintiff said to Officer Starling, "ok lets [sic] talk about this one on one" and began walking towards the "redline." (*Id.*; Doc. # 20-2.) Officer Starling

1 asked him to stop at the line. (*Id.*) By this time, Officer Pauli had moved to where he could see
2 Plaintiff, and observed him step "over the red line at the front of the yard in an aggressive
3 manner to where Officer Starling was standing." (Doc. # 20-2 at 2.) Officer Starling began to
4 think that Plaintiff was going to try to assault him, and gave Plaintiff multiple orders to back up,
5 which he did not heed. (Doc. # 20-1 at 2.) According to both Officer Pauli's and Officer
6 Starling's reports, Plaintiff then ran up to him and struck him on the left jaw. (Doc. # 20-1; Doc.
7 # 20-2.) Officer Starling swung back, and as Officer Starling was trying to place the inmate to
8 the ground, Correctional Officer Pauli gave several verbal commands for Plaintiff to get on the
9 ground. (*Id.*) According to both officers' reports, Plaintiff continued to fight. (*Id.*) Officer Pauli
10 then racked the shot gun and continued to give the command to Plaintiff to stop fighting and lay
11 on the ground. (Doc. # 20-2 at 2.) The fight then went to the ground, and Plaintiff still did not
12 comply with orders to stop fighting and get to the ground, so Officer Pauli fired a blank round
13 and continued giving commands to Plaintiff to stop fighting and get on the ground. (*Id.*) Plaintiff
14 again failed to heed the commands. (*Id.*) Officer Pauli then fired "one live round (7 1/2 birdshot)
15 approximately one to three yards in front of the inmate and Officer Starling attempting to skip
16 the shot into the inmate." (*Id.*) Plaintiff then became compliant and Officer Starling placed him
17 in restraints. (Doc. # 20-1 at 2; Doc. # 20-2 at 2.) Other officers and medical staff subsequently
18 arrived on scene. (*Id.*)

19 The unusual occurrence report indicates that after the incident Plaintiff reported that he
20 "ha[s] seizures." (Doc. # 22-1 at 2.) He reported he had a grand mal seizure for five minutes after
21 the incident. (*Id.*) It was noted that Plaintiff had multiple bumps from the birdshot pellets on his
22 forehead, right buttock, right thigh, left leg and left foot. (*Id.*) It was ordered he be admitted to
23 the infirmary. (*Id.*)

24 Plaintiff received disciplinary charges for assault and battery, was found guilty, and
25 received 540 days in disciplinary segregation, 867 days lost stat time and was required to pay
26 restitution. (Doc. # 20 at 4; Doc. # 20-5; Doc. # 20-6; Doc. # 20-8.)

27 Defendant Pauli cites to NDOC Operational Procedure 405 which governs the use of
28 force within NDOC facilities, and states that the firing of a warning shot and the birdshot are

1 types of non-deadly force because they do not carry a substantial risk of death. (Doc. # 20 at 6;
 2 Doc. # 20-7 at 3.) He maintains that consistent with Operational Procedure 405, he only used that
 3 amount of force necessary on May 29, 2012 to gain Plaintiff's compliance and maintain the
 4 safety and security of the institution. (Doc. # 20 at 7-8.) He asserts that he initially gave Plaintiff
 5 multiple verbal commands to stop fighting Officer Starling and to get to the ground, which
 6 Plaintiff did not follow. (*Id.* at 7.) He points out that Plaintiff's attack itself on Officer Starling
 7 placed Officer Starling in danger, but it also made him vulnerable to the "hundred or so inmates
 8 milling unrestrained in the yard." (*Id.*; Doc. # 20-1 at 2; Doc. # 20-2 at 2.) When Plaintiff failed
 9 to respond to Officer Pauli's verbal commands, Officer Pauli escalated his use of force to the
 10 next level by firing a blank warning shot. (*Id.*) Plaintiff ignored the warning shot and continued
 11 to fight Officer Starling. (*Id.*) Officer Pauli continued issuing verbal commands, which Plaintiff
 12 ignored; therefore, Officer Pauli escalated the use of force to the next level by "chambering a live
 13 round of 7 1/2 birdshot and firing it two to three feet away from Plaintiff in order to skip the shot
 14 into Plaintiff's body." (*Id.*) The shot was fired on the ground near Plaintiff, consistent with
 15 Operational Procedure 405. (*Id.*) After this, Plaintiff became compliant. (*Id.* at 8.)

16 In response to Plaintiff's allegation that he was being assaulted by Officer Starling,
 17 Officer Pauli claims that "[a]ny punches Plaintiff received were part and parcel of the physical
 18 struggle he had launched upon C/O Starling, and the resultant bruise on his head can be
 19 explained quite simply as the natural consequence of engaging in a physical fight with another
 20 person." *Id.* As to his claimed seizure, Officer Pauli contends that this was self-diagnosed and
 21 never verified by medical staff. (*Id.*)

22 Officer Pauli argues that he used only that amount of force necessary to gain Plaintiff's
 23 compliance; the use of force was not malicious or sadistic in order to cause harm. (*Id.*)

24 Finally, Officer Pauli contends that he is entitled to qualified immunity because he used
 25 the minimal amount of force necessary to regain control of Plaintiff, who was engaged in an
 26 attack on a correctional officer in an open yard filled with unrestrained inmates. (*Id.* at 9-10.) He
 27 asserts that no reasonable officer would have known that this conduct would violate the Eighth
 28 Amendment. (*Id.* at 10.)

1 **2. Plaintiff's Response/Cross-Motion**

2 Plaintiff asserts that the court should defer ruling on defendant Pauli's motion for
 3 summary judgment so that Plaintiff may conduct discovery. (Doc. # 31 at 8.) He contends that he
 4 needs: "(1) affidavits and declarations (2) photographs (3) interrogatory responses (4)
 5 depositions [sic] transcripts (5) copies of letters (6) copies of documents." (*Id.*) Plaintiff also
 6 references wanting to know why the defendants were "let go" from their employment with
 7 NDOC, and if either had any other altercations with other inmates before or after this incident.
 8 (*Id.* at 5.) He would also like to obtain all of the clothing he wore (presumably on the date of the
 9 incident) to be "submitted for review." (*Id.*) He then requests that the court order him assistance
 10 in reviewing his medical records. (*Id.*) He also references a motion for appointment of counsel
 11 (which he has filed at Doc. # 46, and which the court will address via separate order).

12 He then states that he wants to obtain declarations and affidavits from the officers at his
 13 disciplinary hearing and his cell mate at the time of the incident, who he claims heard Officer
 14 Starling come to Plaintiff's cell after the incident and ask him how his head felt. (*Id.* at 6.)

15 Plaintiff also seeks to obtain declarations from unspecified inmates who were on the yard
 16 that day. (*Id.* at 7.) He contends he has been housed in segregation and unable to obtain
 17 declarations or affidavits. (*Id.*)

18 Plaintiff requests an order for x-rays which he contends will show the locations where the
 19 pellets hit him which will prove he was on the ground at the time defendant Pauli fire the live
 20 round. (*Id.* at 7.)

21 Next, Plaintiff asserts that defendant Starling assaulted Plaintiff which caused him to
 22 black out and sustain a knot on his head. (*Id.*) He disputes statements that defendant Starling
 23 attributes to Plaintiff in his report made after the incident which was filed in support of defendant
 24 Pauli's motion for summary judgment. (*Id.* at 8-9; *see* report at Doc. # 20-1 at 2.)

25 Finally, Plaintiff contends that Officer Starling used force in a malicious and sadistic
 26 manner to cause Plaintiff harm. (*Id.* at 11.) He argues that Officer Pauli must have seen Officer
 27 Starling on top of Plaintiff "boun[cing] his head off the ground" and did not report what Officer
 28 Starling did. (*Id.* at 11-12.)

1 **3. Defendant Pauli's Reply**

2 Defendant Pauli argues that Plaintiff fails to raise a genuine dispute of material fact to
 3 defeat his motion for summary judgment. (Doc. # 33 at 2-4.) First, in response to Plaintiff's
 4 request for copies of x-rays that he says will confirm he was lying down at the time defendant
 5 Pauli fired the live shot, defendant Pauli admits that Plaintiff was lying down; however, Plaintiff
 6 was on the ground still engaging in a fight with Officer Starling and refusing to obey commands
 7 to submit. (*Id.* at 3.)

8 Second, to the extent Plaintiff claims that Officer Starling "bounced Plaintiff's head on
 9 the ground," defendant Pauli claims this has no bearing on his use of force which was limited to
 10 skipping the birdshot off the ground to gain Plaintiff's compliance. (*Id.*) Even assuming
 11 defendant Pauli saw Officer Starling engage in this contact, it does not change the fact that
 12 Plaintiff was involved in an altercation with a correctional officer and refused to respond to his
 13 commands to submit, rendering the institution vulnerable. (*Id.* at 4.)

14 Third, defendant Pauli contends that Plaintiff's disagreement with statements Officer
 15 Starling attributed to him in his report after the incident likewise has no bearing on defendant
 16 Pauli's use of force. (*Id.* at 3.)

17 Finally, as to Plaintiff's request to conduct discovery, he maintains the requested
 18 discovery would have no impact on Plaintiff's claim of excessive force against defendant Pauli,
 19 and Plaintiff has not properly justified his request to defer ruling on this motion while he obtains
 20 discovery. (*Id.* at 4-6.)

21 **B. Plaintiff's Request to Defer Ruling on Pauli's Motion for Summary Judgment so
 22 Plaintiff Can Conduct Discovery**

23 If a nonmovant shows by affidavit or declaration that, for specified reasons, it
 24 cannot present facts essential to justify its opposition, the court may:

- 25 (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

26 Fed. R. Civ. P. 56(d).

27 "Under Fed. R. Civ. P. 56(f) [now 56(d)], a trial court may order a continuance on a
 28 motion for summary judgment if the party requesting a continuance submits affidavits showing

1 that, without Rule 56 assistance, it cannot present facts necessary to justify its claims. The
2 requesting party must show: (1) it has set forth in affidavit form the specific facts it hopes to
3 elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential
4 to oppose summary judgment." *Family Home and Finance Center, Inc. v. Federal Home Loan*
5 *Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008) (citing *Cal. On Behalf of Cal. Dep't of Toxic*
6 *Substances Control v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998)). "Failure to comply with
7 these requirements 'is a proper ground for denying discovery and proceeding to summary
8 judgment.'" *Id.* (citation omitted); *see also Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1091
9 n. 5 (9th Cir. 2009).

10 Plaintiff has not met his burden of showing that the court should defer ruling on this
11 motion for summary judgment because Plaintiff cannot present facts essential to justify his
12 opposition. First, Plaintiff contends that he needs to obtain affidavits and declarations to support
13 his opposition. He references his need to obtain declarations from officers who were at his
14 disciplinary hearing; however, the statements of officers at his disciplinary hearing would have
15 no impact on the conduct of defendant Pauli when he fired the live shot that resulted in the
16 pellets striking Plaintiff. Plaintiff also states that he would like to obtain an affidavit from his
17 cellmate at the time who heard a statement that Officer Starling made *after* the incident, asking
18 about Plaintiff's head asserted head injury. Again, this statement has no bearing on defendant
19 Pauli's alleged use of excessive force. Finally, Plaintiff indicates a need to obtain declarations
20 from unspecified inmates on the yard that day; however, he fails to state what these inmates say
21 and how it would assist his opposition. He gives no indication that these inmates would give
22 testimony to rebut defendant Pauli's assertion that he acted reasonably that day.

23 Plaintiff makes vague reference to his need to obtain photographs, letters and documents,
24 but in no way specifies what facts he hopes to elicit from these materials or how they might
25 impact his case. He indicates that he would like to propound interrogatories and conduct
26 depositions but does not identify to whom or what he might ask. Nor does he explain how these
27 tools would bolster his argument in opposition to defendant Pauli's motion for summary
28 judgment.

1 Next, Plaintiff states that he wants to know why each of the defendants was "let go" from
2 their employment at NDOC; however, this has no discernable bearing on the action of defendant
3 Pauli on May 29, 2012.

4 Plaintiff then states that he would like the clothing he was wearing (presumably on
5 May 29, 2012) produced, but gives no indication of how this is at all relevant to his claim against
6 defendant Pauli.

7 Finally, he seeks assistance reviewing his medical records. Defendant Pauli has produced
8 only two pages of medical records that relate to the incident, the unusual occurrence report and
9 progress notes from that date. The court has reviewed the records and cannot conclude that
10 assistance in reviewing them is necessary. Moreover, the unusual occurrence report documents
11 Plaintiff's subjective complaints that day.

12 In sum, Plaintiff has failed to convince the court that it is necessary to defer ruling on
13 defendant Pauli's motion while Plaintiff engages in discovery. Therefore, his request for such a
14 deferral under Federal Rule of Civil Procedure 56(d) should be denied. Plaintiff is advised that a
15 scheduling order has been entered in this action on May 20, 2014, giving the parties until
16 August 18, 2014 to conduct discovery. (Doc. # 41.) Should Plaintiff wish to propound discovery
17 relative to defendant Starling, he should not delay in doing so. With this advisement, any request
18 to extend the discovery deadline will not be viewed favorably in the absence of good cause.

19 The court will now turn to the merits of the motions for summary judgment.

20 **C. Eighth Amendment Excessive Force Legal Standard**

21 The Eighth Amendment prohibits the imposition of cruel and unusual punishment. U.S.
22 Const. amend VIII. It "embodies broad and idealistic concepts of dignity, civilized standards,
23 humanity, and decency." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation and internal
24 quotations omitted). The "unnecessary and wanton infliction of pain...constitutes cruel and
25 unusual punishment forbidden by the Eighth Amendment." *Id.* (quoting *Whitley v. Albers*, 475
26 U.S. 312, 319 (1986)).

27 "[W]henever prison officials stand accused of using excessive physical force in violation
28 of the [Eighth Amendment], the core judicial inquiry is...whether force was applied in a good-

1 faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."
 2 *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992); *see also Whitley*, 475 U.S. at 320-2; *Watts v.*
 3 *McKinney*, 394 F.3d 710, 711 (9th Cir. 2005); *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th
 4 Cir. 2003). "When prison officials maliciously and sadistically use force to cause harm,
 5 contemporary standards of decency are always violated." *Hudson*, 503 U.S. at 9 (citing *Whitley*,
 6 475 U.S. at 327.)

7 In determining whether the use of force is excessive, courts are instructed to examine "the
 8 extent of the injury suffered by the inmate;" "the need for application of force, the relationship
 9 between that need and the amount of force used, the threat 'reasonably perceived by the
 10 responsible officials,' and 'any efforts made to temper the severity of the forceful response.'" *Hudson*, 503 U.S. at 7 (quoting *Whitley*, 475 U.S. at 321).

12 An inmate need not establish serious injury; however, the lack of serious injury is
 13 relevant to the Eighth Amendment inquiry. *See Wilkins v. Gaddy*, 130 S.Ct. 1175, 1178 (2010).
 14 "The extent of injury may also provide some indication of the amount of force applied." *Id.* That
 15 being said, not "every malevolent touch by a prison guard gives rise to a federal cause of
 16 action...The Eighth Amendment's prohibition of 'cruel and unusual' punishments necessarily
 17 excludes from constitutional recognition *de minimis* uses of physical force, provided that the use
 18 of force is not of a sort 'repugnant to the conscience of mankind.'" *Hudson*, 503 U.S. at 9-10
 19 (quoting *Whitley*, 475 U.S. at 327); *see also Wilkins*, 130 S.Ct. at 1178 (citation omitted) ("An
 20 inmate who complains of a 'push or shove' that causes no discernable injury almost certainly fails
 21 to state a valid excessive force claim"). "Injury and force, however, are only imperfectly
 22 correlated, and it is the latter that ultimately counts. An inmate who is gratuitously beaten by
 23 guards does not lose his ability to pursue an excessive force claim merely because he has the
 24 good fortune to escape without serious injury." *Wilkins*, 130 S.Ct. at 1178-79. If the nature of the
 25 injuries is more than *de minimis*, but still "relatively modest," the inmate's damages will likely be
 26 limited. *See id.* at 1180.

27 Courts must be deferential when reviewing the necessity of using force. *See Whitley*, 475
 28 U.S. at 321-22; *see also Norwood v. Vance*, 591 F.3d 1062, 1067 (9th Cir. 2009), *cert denied*,

1 131 S.Ct. 1465 (Feb. 22, 2011) (citing *Whitley*, 475 U.S. at 322) ("Prison officials are entitled to
 2 deference whether a prisoner challenges excessive force or conditions of confinement").

3 **D. Analysis**

4 Defendant Pauli has produced evidence that on May 29, 2012, his use of force was
 5 employed in a good-faith effort restore discipline and gain Plaintiff's compliance with commands
 6 to cease engaging in an altercation with Officer Starling, and not maliciously and sadistically to
 7 cause harm. He details how the incident began, that he perceived Plaintiff to initiate an
 8 altercation with Officer Starling, but Plaintiff ignored multiple verbal commands as well as a
 9 warning shot intended to curb his conduct. When the incident continued to escalate and Plaintiff
 10 failed to heed his warnings, defendant Pauli escalated his use of force, consistent with
 11 operational procedures at NDOC, by firing a live birdshot into the ground designed to skip into
 12 Plaintiff's body so that he would cease fighting with Officer Starling. Thus, he has sufficiently
 13 detailed the need for application of force, the relationship between the need to use force and the
 14 amount of force used, and his efforts made to temper the severity of the forceful response. He
 15 likewise describes the threat he reasonably perceived not only to Officer Starling but to the
 16 institution given that the altercation was occurring among a large ground of unrestrained inmates.
 17 Finally, he provides evidence that he aimed the birdshot to skip off the ground into Plaintiff
 18 which did result in pellets coming into contact with Plaintiff's body but explains that this was a
 19 reasonable action given Plaintiff's failure to respond to verbal commands or his warning shot.

20 Plaintiff discusses various facts in his response to defendant Pauli's motion, claiming they
 21 raise a genuine dispute of material fact; however, none of them are material to his claim against
 22 defendant Pauli. Instead, they all relate to his claim against Officer Starling, who has not yet
 23 filed a dispositive motion. For example, he contends that his x-rays will show where the pellets
 24 hit him which will prove he was on the ground at the time defendant Pauli fired the live round.
 25 Defendant Pauli does not dispute Plaintiff was on the ground when he fired the shot. Plaintiff
 26 does not dispute defendant Pauli's statement that while on the ground, Plaintiff was still engaging
 27 Officer Starling in the altercation and refusing to heed commands to stop. Plaintiff also claims
 28 that defendant Starling was assaulting him; however, even if true, Plaintiff does not dispute that

1 he initiated the altercation, ignored Officer Pauli's commands to cease fighting, and continued to
2 do so while on the ground with Officer Starling, thereby justifying Officer Pauli's use of force.
3 While Plaintiff disputes statements attributed to him in Officer Starling's report, none of these
4 statements have an impact on Officer Pauli's use of force.

5 In sum, Plaintiff has not raised a genuine dispute of material fact so as to defeat
6 defendant Pauli's motion for summary judgment. Nor has he presented evidence on his own
7 behalf that establishes the absence of a genuine dispute of material fact in support of his cross-
8 motion for summary judgment. Therefore, the court recommends that defendant Pauli's motion
9 (Doc. # 20) be granted, and Plaintiff's cross-motion (Doc. # 31) be denied.

10 **IV. RECOMMENDATION**

11 **IT IS HEREBY RECOMMENDED** that the District Judge enter an order:

- 12 (1) **DENYING** Plaintiff's request to defer considering defendant Pauli's motion for summary
13 judgment under Federal Rule of Civil Procedure 56(d);
14 (2) **GRANTING** defendant Pauli's motion for summary judgment (Doc. # 20); and
15 (3) **DENYING** Plaintiff's cross-motion for summary judgment (Doc. # 31).

16 The parties should be aware of the following:

17 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule IB 3-2 of the Local
18 Rules of Practice, specific written objections to this Report and Recommendation within fourteen
19 days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and
20 Recommendation" and should be accompanied by points and authorities for consideration by the
21 District Court.

22 2. That this Report and Recommendation is not an appealable order and that any notice of
23 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
24 until entry of the District Court's judgment.

25 DATED: June 23, 2014.

26 *William G. Cobb*

27

WILLIAM G. COBB
28 UNITED STATES MAGISTRATE JUDGE